TESTIMONY

BEFORE THE SUBCOMMITTEE ON

THE CONSTITUTION AND CIVIL JUSTICE

OF THE

HOUSE COMMITTEE ON

THE JUDICIARY

ON

THE STATE OF RELIGIOUS LIBERTY IN THE UNITED STATES

BY

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My name is Gregory Baylor, and I serve as Senior Counsel with Alliance Defending Freedom, a non-profit legal organization that advocates for religious liberty, the sanctity of life, and marriage and the family through strategy, funding, training, and litigation. I appreciate the opportunity to testify today regarding the state of religious liberty in the United States.

Americans of all faiths have reason to be concerned about the current Administration's religious liberty record. No Administration, of course, has had a perfect record on religious freedom. Whatever the president's party, the Executive branch is inclined to protect its own prerogatives, defending its power to pursue policy objectives in the manner it sees fit. Moreover, reasonable people can sometimes disagree about how certain religious liberty controversies ought to be resolved, particularly where the applicable legal rules require government to balance competing interests in a case-specific, fact-dependent manner.[1] And the Administration has, on a number of occasions, embraced a proper understanding of religious liberty and church-state relations.[2]

Nonetheless, the current Administration has all too often taken what can only be characterized as extreme positions designed to dramatically decrease religious freedom. My testimony will focus on three examples: (1) the promulgation and legal defense of the HHS contraceptive mandate; (2) the unsuccessful attempt to eliminate the Religion Clauses'

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[1] *See, e.g.*, 42 U.S.C. § 2000bb *et seq*. (Religious Freedom Restoration Act).

[2] For example, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the United States urged the Supreme Court to reject an Establishment Clause challenge to town's practice of opening town board meetings with prayer. *See* 2013 WL 3990880 (U.S. Aug. 2, 2013) (Brief of the United States as Amicus Curiae Supporting Petitioner). In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), the United States filed a friend of the court brief with the Supreme Court arguing that taxpayers lacked standing to challenge a state statute that provided tax credits for voluntary contributions to organizations that award scholarships to children attending private schools, including religious schools. The Solicitor General's brief also argued that the statute did not violate the Establishment Clause. *See* 2010 WL 3066230 (U.S. Aug. 6, 2010) (Brief of the United States as Amicus Curiae Supporting Petitioners). In addition, the Department of Justice Civil Rights Division has frequently acted to vindicate rights protected by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (RLUIPA).

ministerial exception; and (3) the NLRB's ongoing effort to intrude into the internal affairs of our nation's religious colleges and universities.

The Patient Protection and Affordable Care Act requires non-grandfathered group health plans to include insurance coverage for women's "preventive care and screenings" without cost sharing.[3] Congress delegated to the Department of Health and Human Services (HHS) the power to determine exactly what preventive care and screenings must be covered. Going beyond non-controversial care and screenings whose health benefits are clear, HHS elected to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient protection and counseling for all women with reproductive capacity."[4] The category of FDA-approved contraceptive methods and sterilization procedures, in turn, includes intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. HHS has asserted that mandatory coverage of "contraceptives," including drugs and devices that sometimes function abortifaciently, will reduce the rate of unintended pregnancies and the adverse health events allegedly associated therewith. HHS's assertion simply does not bear scrutiny, rendering the Administration's imposition on religious exercise all the more indefensible.[5]

HHS had at least some understanding that forcing employers to facilitate access to contraceptives and abortifacients would violate certain employers' deeply held religious convictions. HHS could have exempted all sincere conscientious objectors. It could even have exempted all religious employers.[6] Virtually all state contraceptive coverage mandates include

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[3] 42 U.S.C. § 300gg-13(a)(4).

[4] *See* Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 3, 2014).

[5] *See* Helen Alvaré, "No Compelling Interest: The 'Birth Control' Mandate and Religious Freedom," 58 Vill. L. Rev. 379 (2013).

[6] As an illustration, HHS could easily have imported the religious exemptions from the ban on religious discrimination in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1(a); *id*. § 2000e-2(e)(2). Although

comparatively broad religious exemptions.[7] However, HHS chose to adopt an extraordinarily narrow religious exemption from the Mandate. In its original form, the exemption was limited to employers that (1) have the inculcation of religious values as their purpose; (2) primarily employ persons who share their religious tenets; (3) primarily serve persons who share their religious tenets; and (4) are churches, their integrated auxiliaries, and conventions or associations of churches.[8] Many observers accurately remarked that neither Jesus nor Mother Teresa would qualify for this shockingly narrow religious exemption. The exemption excluded—and continues to exclude—the vast majority of religious educational institutions, social service agencies, health care providers, publishers, advocacy organizations, and other non-church religious entities.

It is reasonably clear that HHS—in crafting the contraceptive Mandate and its narrow religious exemption—failed even to contemplate seriously its duties under the Religious Freedom Restoration Act (RFRA). In April 2012 testimony before the House Education and Workforce Committee, HHS Secretary Kathleen Sebelius revealed that the agency did not procure a written legal opinion assessing the compatibility of the Mandate with RFRA.[9]

The Administration rejected countless calls to expand the religious exemption. A large number of prominent religious organizations explained their faith-based objections to the

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this would not have protected all conscientiously objecting employers, it would have been markedly better than what the agency adopted.

[7] *See* National Conference of State Legislatures, "Insurance Coverage for Contraception Laws," available at http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Jun. 9, 2014). It bears noting that group health plans may avoid these state mandates by self-insuring. In some states, the mandate applies only if the employer elects to cover prescription drugs; accordingly, a conscientiously objecting employer could avoid covering morally unacceptable drugs and devices by excluding prescription drugs from its plan. Neither response is available under the Affordable Care Act and its implementing regulations.

[8] 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The Administration later slightly expanded the exemption by eliminating the first three requirements.

[9] *See* http://www.youtube.com/watch?v=eU6ShTWOaWw (last visited Jun. 9, 2014).

Mandate in comments submitted to HHS in response to its proposed rulemaking.[10] Commenters also explained that the so-called "accommodation" for non-exempt religious employers failed to satisfy their sincere moral concerns. Either ignoring or rejecting those expressions of concern, the Administration moved forward with this inadequate "accommodation."

Given the Administration's failure to respect religious liberty in the regulatory process, an unprecedented number of individuals and organizations found it necessary to seek judicial vindication of their fundamental right to religious freedom. To date, 100 cases involving over 300 plaintiffs have been filed.[11] In defending these lawsuits, the Administration has made a number of remarkable arguments which, if accepted, will dramatically decrease the legal protections of religious freedom.

First, the government defendants have argued that for-profit businesses and their family owners cannot ever exercise religion in the marketplace.[12] This legal argument reflects a fundamental error about how many Americans live out their religious convictions. For many, religious exercise is not confined to a weekly worship service in a church, temple, or mosque. Instead, religion affects every aspect of their existence, including their behavior in the workplace and the broader marketplace. To categorically withhold legal protection of religious exercise in this realm of life is no small thing. Yet this is precisely what the government advocates.

Second, the Administration has shown a disturbing willingness to second-guess and even discredit the religiously-based moral assessments of individuals and organizations that cannot, in good conscience, comply with the Mandate. The government has essentially argued that those

[10] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops on Interim Final Rules on Preventive Services (Aug. 31, 2011), available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf (last visited Jun. 9, 2014).
[11] *See* The Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited Jun. 9, 2014).
[12] *See, e.g.*, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S.), and *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.), argued Mar. 25, 2014.

objecting to the Mandate are simply *wrong* to conclude that their degree of complicity in immoral conduct is ethically unacceptable. It has argued that entities eligible for the so-called "accommodation" have no right to complain, since completing the self-certification form that triggers objectionable coverage can be done "in a matter of minutes." Under this logic, the government could force an Orthodox Jew to flip a light switch on the Sabbath on the ground that doing so takes little time or effort.

Third, the government is attempting to distort and dilute the Religious Freedom Restoration Act, urging courts essentially to re-write the statute to protect government power to a much greater extent than Congress ever intended. Specifically, the government defendants are arguing in pending cases that religious claimants may not prevail whenever the interests of third parties are somehow implicated. Congress, of course, explicitly contemplated that courts would consider the interests of third parties, requiring governments that substantially burden religious exercise to prove that challenged regulations advance compelling governmental interests. But Congress plainly did not declare that RFRA claimants automatically lose whenever third party interests are implicated.

Fourth, the government has remarkably argued that the imposition of massive financial penalties is not a "substantial burden" under the Religious Freedom Restoration Act. There is a principle of Free Exercise Clause jurisprudence under which government action is not impermissible simply because it makes religious exercise more expensive. In defending the HHS Mandate, the government has distorted this principle beyond recognition, arguing that it permits the government to impose crippling fines upon non-compliant employers with impunity. Under this logic, legal protections of religious liberty like RFRA would not forbid a government from imposing a fine for attendance at worship services.

Unfortunately, the HHS Mandate is not the only context in which the Administration has taken extreme positions designed to dramatically undermine religious freedom. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), it argued that religious entities have no right under the Religion Clauses to choose their own ministers without governmental interference.

After a private Lutheran school terminated a teacher designated as a minister for failing to follow religiously prescribed grievance procedures, the Equal Employment Opportunity Commission (EEOC) brought an action against the school, claiming that the teacher had been fired in retaliation for threatening to file a lawsuit under the Americans with Disabilities Act (ADA).[13] The school invoked the "ministerial exception," a doctrine uniformly adopted by the federal Courts of Appeals, which precludes application of employment discrimination legislation to claims involving the relationship between a religious entity and its ministers.[14] But the EEOC argued that such an exception did not exist, and that the Religion Clauses of the First Amendment gave no greater protection to religious entities in this context than non-religious entities under the general right to free association.[15] The Supreme Court found this position "untenable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[16] The Court could not accept the "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[17]

[13] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct.694 (2012).
[14] *Id.* at 701, 705.
[15] *Id.* at 706.
[16] *Id.* at 707.
[17] *Id.*

EEOC and DOJ lawyers went a step further and additionally argued that the Supreme Court's decision *Employment Division v. Smith*[18] actually precluded the recognition of an exception protecting the most basic right of religious entities to designate their own ministers.[19] The *Smith* case involved two members of the Native American Church who were denied unemployment benefits because they had ingested peyote, a hallucinogen used in sacramental ceremonies by the Church, in violation of Oregon law. It held that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[20] Thus, according to the EEOC, because the ADA and other employment discrimination laws are neutral and generally applicable to religious and non-religious entities alike, religious entities were still obligated to comply with them, even when making decisions involving the designation of their own ministers. Thankfully, the Court rejected this argument as well, pointing out that the *Smith* case involved a regulation on physical conduct only, so it did not follow that it should have any applicability to a case involving "government interference with an internal church decision that affects the faith and mission of the church itself."[21]

To say the least, it is disturbing that the current Administration would advocate a view so contrary to the principles of religious freedom enshrined in our Constitution. The framers of the Constitution had firsthand experience with the negative effects of government involvement in the

[18] *See Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 972 (1990).
[19] *Hosanna-Tabor*, at 707.
[20] *Smith,* at 879.
[21] *Hosanna-Tabor,* 132 S. Ct. at 707.

church; the idea that the First Amendment permits the government to meddle with a church's designation of its ministers would be unfathomable to them.[22]

Finally, the National Labor Relations Board (NLRB), without due regard for federal court precedent, has vigorously sought to assert jurisdiction over religious institutions of higher education. A regional NLRB office recently ruled in favor of unionization of adjunct faculty at two private religious universities; at least one of those cases is currently on appeal to the Board.[23]

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[22] In *Hosanna-Tabor*, the Supreme Court referenced two documents written by James Madison, the principal author of the Bill of Rights, to support this understanding of the law:

> This understanding of the Religion Clauses was reflected in two events involving James Madison, " 'the leading architect of the religion clauses of the First Amendment.' " *Arizona Christian School Tuition Organization v. Winn,* 563 U.S. ——, ——, 131 S. Ct. 1436, 1446, 179 L.Ed.2d 523 (2011) (quoting *Flast v. Cohen,* 392 U.S. 83, 103, 88 S. Ct. 1942, 20 L.Ed.2d 947 (1968)). The first occurred in 1806, when John Carroll, the first Catholic bishop in the United States, solicited the Executive's opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase. After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church "functionaries" was an "entirely ecclesiastical" matter left to the Church's own judgment. Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909). The "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," Madison explained, prevented the Government from rendering an opinion on the "selection of ecclesiastical individuals." *Id.,* at 63–64.
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> The second episode occurred in 1811, when Madison was President. Congress had passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. Madison vetoed the bill, on the ground that it "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" 22 Annals of Cong. 982–983 (1811). Madison explained:
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>> "The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same* ; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises." *Id.,* at 983 (emphasis added).

Id. at 703-04.

[23] In 2013, the NLRB Regional Director in Seattle decided to exercise jurisdiction over Pacific Lutheran University, a private Lutheran university, and allow for unionization of adjunct faculty. This decision is currently on appeal. *Pacific Lutheran University v. SEIU 925*, No. 19-RC-102521. On April 23, 2014, the NLRB Regional Director in Seattle decided to exercise jurisdiction over Seattle University, a private Jesuit Catholic university, allowing unionization of adjunct faculty there as well. Katherine Long, Labor Board: Seattle University Adjuncts Can Vote to Unionize, http://blogs.seattletimes.com/today/2014/04/labor-board-seattle-university-adjuncts-can-vote-to-unionize (Apr. 23, 2014).

But application of the National Labor Relations Act to religious schools is unconstitutional, as the Supreme Court previously indicated in *NLRB v. Catholic Bishop of Chicago*.[24] In *Catholic Bishop*, the Board had decided to exercise jurisdiction over several schools operated by the Roman Catholic Church, finding that the schools had engaged in unfair labor practices under the National Labor Relations Act by refusing to engage in collective bargaining with employee unions. The Board's rationale was that the schools were not "completely religious" because they offered instruction in secular subjects as well as religious training, and its policy was to refrain from exercising jurisdiction only in cases where an educational institution was "completely religious" rather than just "religiously associated."[25]

Rather than declaring outright that the Board's exercise of jurisdiction violated the Constitution, the Court instead stated only that serious questions had been raised that it did.[26] In that situation, the Court was obligated to first see if there was another plausible construction before interpreting the Act in a way that would violate the Constitution.[27] The Court did that, holding that there was no evidence of congressional intent to make religious schools subject to the Board's jurisdiction when it enacted the NLRA and subsequent amendments.[28] The issue of religious schools simply did not appear to be contemplated by Congress in considering whether to pass the Act or later amendments, but, as the Court noted, "[i]t is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations not covered by the Act."[29]

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[24] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).
[25] *Id*. at 493.
[26] *Id.* at 501.
[27] *Id.* at 504.
[28] *Id.* at 504-07.
[29] *Id.* at 504-05 (citations omitted).

Absent a clear intent to create the constitutional conflict the Court identified, the Court declined to reach the constitutional question and instead held that the NLRA does not authorize the Board to exercise jurisdiction over religious schools. Even though the Court stopped short of making the conclusion, the Court's decision in *Catholic Bishop* makes clear that it would likely find that NLRB jurisdiction over religious schools violates the First Amendment, due to excessive entanglement and interference with religious autonomy.[30]

The NLRB subsequently began deciding what schools were "religious enough" to warrant protection under *Catholic Bishop*. It embraced a "substantial religious character" test, exercising jurisdiction over those schools it concluded lacked such a character.[31] In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the D.C. Circuit, noting the substantial risk of excessive entanglement and interference with religious autonomy, deemed it inappropriate for the NLRB to inquire into a university's "substantial religious character."[32] It declared that the proper test was whether the university held itself out to the public as a religious institution, was nonprofit, and was religiously affiliated.[33] The court observed that its test "does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs."[34] The D.C. Circuit reaffirmed this approach in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

Despite these judicial precedents, the NLRB continues to assert its jurisdiction over religious schools, thereby raising all the constitutional concerns described by the Supreme Court and lower federal courts. In addition to Pacific Lutheran University and Seattle University

[30] *See id.* at 502-03; *Hosanna-Tabor*, 132 S. Ct. at 702, 706; *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (The Constitution guarantees religious organizations "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.")
[31] *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1339 (D.C. Cir. 2002).
[32] *Id*. at 1342-43.
[33] *Id*. at 1343-45.
[34] *Id*. at 1344.

(mentioned above), it has claimed jurisdiction over Manhattan College,[35] St. Xavier University,[36] and Duquesne University of the Holy Spirit.[37]

In conclusion, the Administration's approach to these three areas—the HHS Mandate, the ministerial exception, and NLRB jurisdiction—poses serious threats to a proper understanding of religious freedom. In each case, the Administration has taken an extreme position, one that, if accepted, would dramatically decrease the legal protections of religious liberty. All Americans who love our "First Freedom" ought to be alarmed at the Administration's willingness to undermine that fundamental right.

[35] Case No. 2-RC-23543.
[36] Case No. 13-RC-22025.
[37] Case No. 6-RC-08933.